No. 87-1379

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Petitioners,

v.

REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an individual has a substantial privacy interest in information concerning his criminal record, when that information is already a matter of public record.

2. Whether the privacy interest in the criminal record of a principal of a government defense contractor is outweighed by the public interest embodied in the disclosure policies of the Freedom of Information Act.

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STATEMENT OF THE CASE

In January 1978, there were several published reports that the United States Attorney in Philadelphia, David Marston, was investigating two Democratic congressmen from Pennsylvania, Joshua Eilberg and Daniel Flood, for alleged conflict of interest and corruption. C.A. App. 136. At the time, Congressman Flood was a senior member of the House of Representatives and Chairman of the House Appropriations Subcommittee. *Id.* at 137.

CBS News assigned respondent Robert Schakne, a correspondent in its investigative unit, to investigate the allegations about Congressman Flood. *Ibid.* In the course of Mr. Schakne's investigation, he learned that Congressman Flood had been instrumental in arranging certain Department of Defense contracts for Medico Industries. *Ibid.* Mr. Schakne also learned that William Medico, General Manager of Medico Industries, had been identified by both the federal Bureau of Narcotics and the Pennsylvania Crime Commission as a "criminal associate" of organized crime leader Russel Bufalino. *Ibid.* The Pennsylvania Crime Commission report specifically stated that William Medico had a criminal record which included "arrests for suspicion of murder and assault, and convictions for bootlegging and disorderly conduct." *Ibid.* The report also included Medico Industries in a list of "legitimate businesses dominated by organized crime figures [which] have received a number of lucrative public contracts." *Ibid.*

Because of the great public interest in the investigation of Congressman Flood, and the potential newsworthiness of the relationship between an allegedly corrupt congressman and a business that was reportedly dominated by organized crime but was receiving millions of dollars of federal funds, respondent Schakne sought further information about the principals behind Medico Industries, *i.e.*, various members of the Medico family. *Id.* at 137-137A.[1] In particular, Mr. Schakne sought to verify the allegations concerning the criminal records of the Medicos. *Id.* at 137A.

[1] Citations to page "137A" and, *infra*, to page "213A" are to the unnumbered pages following pages 137 and 213, respectively.

On February 3, 1978, following the rejection of an oral request for information about the Medicos' criminal records, Mr. Schakne submitted a Freedom of Information Act ("FOIA") request to the Department of Justice, seeking information about any sentences, convictions, indictments, or arrests involving William, Phillip, Charles, or Samuel Medico. *Id.* at 137A, 179. The Department of Justice initially refused to provide any of the requested information. *Id.* at 138, 180, 183. Mr. Schakne appealed, and the Department of Justice agreed to disclose the criminal identification record (i.e., "rap sheet") of William Medico, who was deceased, but otherwise affirmed the denial of Mr. Schakne's request, *id.* at 138-39, 185-87.

On September 21, 1978, The Reporters Committee for Freedom of the Press filed a FOIA request with the Department of Justice for information about any arrest, indictment, acquittal, conviction, or sentence of William, Phillip, Charles, or Samuel Medico. *Id.* at 139, 188. On October 30, 1978, the Department responded that insufficient information had been provided to permit an accurate search for records pertaining to William Medico, and it denied the request for criminal-record information concerning the other Medicos. *Id.* at 139-40, 190-91. That denial was affirmed following an administrative appeal. *Id.* at 140, 192-193.

On March 13, 1979, in response to inquiries from CBS News seeking clarification of the Department's position, Attorney General Griffin Bell stated that after "a thorough review" of the Department's "policy and practice" it was "unanimously concluded that . . . we are prohibited by statute and case law from releasing certain records which may be contained in

the F.B.I.'s identification files, commonly known as 'rap sheets.'" *Id.* at 140, 194. Attorney General Bell further stated that criminal history information contained in documents other than rap sheets might be disclosed "if not otherwise exempt." *Id.* at 140-41, 194. The Attorney General went on to explain that the Department's release of William Medico's rap sheet had stemmed from a lack of clarity concerning the Department's position on the release of rap sheets. *Id.* at 141, 196.

Respondents filed suit under FOIA in December 1979. The complaint only sought the disclosure of "matters of public record" that were responsive to the FOIA requests. *Id.* at 9. On April 29, 1983, the government informed the district court of its decision to release all criminal-record information concerning Phillip and Samuel Medico, explaining that they had recently died and that disclosure was intended to be "consistent" with the earlier release of criminal information concerning William Medico, also deceased. *Id.* at 243-243A. The government also belatedly conceded that it now recognized the public interest warranting disclosure of certain public-record information regarding Charles Medico—namely, "financial crime" information located in documents other than rap sheets. *Id.* at 243A. However, a search of Department records other than rap sheets had turned up no "financial crime" information concerning Charles Medico. *Id.* at 244. The government continued to withhold any rap-sheet information that it might have for Charles Medico or any "non-financial crime" information concerning him. *Ibid.*

In the district court and the court of appeals, the government contended that 28 U.S.C. § 534 (1982)

restricts disclosure of rap sheets and that they are therefore exempt from disclosure under Exemption 3, 5 U.S.C. § 552(b)(3) (1982). As to both rap sheets and other records, the government also invoked Exemptions 6 and 7(C), 5 U.S.C. §§ 552(b)(6), 552(b)(7)(C) (1982 & Supp. IV). In this Court, the government has abandoned its reliance on Exemption 3 and is relying solely on Exemptions 6 and 7(C). Petition at 6 n.1.

REASONS FOR DENYING THE WRIT

The court of appeals' decision ordering the release of public-record criminal information does not warrant review by this Court. The court of appeals correctly held that there is only an attenuated privacy interest in information concerning sentences, convictions, acquittals, indictments, or arrests that is freely available to the public. And the court also correctly held that that attenuated privacy interest does not outweigh the public interest in disclosure of information concerning the criminal record of an individual whose company had received defense contracts with the assistance of a congressman under investigation for conflict of interest and corruption.

Respondents agree with the government that a court may appropriately consider the public interest in disclosure of particular information, if for no other reason than to give concrete meaning to the general interests in disclosure underlying FOIA and to facilitate the balancing of the public interest against any substantial privacy interest that may be asserted. To the extent that the court of appeals declined to distinguish among different types of publicly available criminal-record information, its failure

to do so does not warrant review by this Court. The United States Court of Appeals for the District of Columbia Circuit has indicated on several occasions that the public interest in the disclosure of particular documents may be considered. To the extent that the opinion of the panel in this case creates confusion as to the law in the D.C. Circuit, the confusion can be resolved by that Circuit in future cases. This panel's discussion of how to assess the "public interest" did not affect the result in this case, and is unlikely to have the broad impact assumed by the government.

I. The Court of Appeals Correctly Held That There Is Only an Attenuated Privacy Interest in Publicly Available Criminal-Record Information.

The government's petition for certiorari repeatedly mischaracterizes the court of appeals' holding concerning privacy. The court of appeals did not "treat[] all information contained in 'public records' as equally nonprivate," Petition at 14, or equate privacy with "official secrecy at every level of government where the information is maintained," *id.* at 19. The court simply held that there is only "a low-level privacy interest in *criminal records*" which are "*a matter of public record.*" App. 19a, 20a (emphasis added). This result is correct and does not warrant review by this Court.

There is nothing novel about the proposition that there can be little, if any, privacy interest in arrests, indictments, convictions, and other formal actions that occur in the course of a criminal prosecution This Court itself has recognized that an individual has no significant privacy interest as to these matters. In *Paul* v. *Davis*, 424 U.S. 693 (1976), the Court squarely rejected Davis's claim that the disclosure of his arrest on shoplifting charges invaded his privacy: "His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of an official act such as an arrest." *Id.* at 713. Numerous other decisions have also recognized that a person has at most a minimal privacy interest with respect to information about his criminal record. *See, e.g., Hammons* v. *Scott*, 423 F. Supp. 625, 628 (N.D. Cal. 1976); *Roshto* v. *Hebert*, 439 So.2d 428, 432 (La. 1983); *Montesano* v. *Donrey Media Group*, 99 Nev. 644, 668 P.2d 1081, 1084-86 (1983); *Shifflet* v. *Thomson Newspapers*, 69 Ohio St. 2d 179, 431 N.E.2d 1014, 1018 (1982) (*per curiam*); *McCormack* v. *Oklahoma Publishing Co.*, 613 P.2d 737, 741-42 (Okla. 1980).

By its very nature, information concerning criminal conduct and the administration of justice is public, not private. "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public . . . ." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975). A criminal charge or conviction is not a private matter involving only the defendant; it is a matter in which the entire community has a substantial interest.

Precisely because of the inherently public nature of, and strong public interest in, criminal prosecutions, records of the formal steps in a criminal prosecution are freely available to the public in nearly all jurisdictions. According to the amicus curiae brief submitted by Search Group, Inc. in support of the

government's suggestion of rehearing en banc, "in virtually every state, records describing a specific arrest are available to the public from the law enforcement agency that made the arrest," and "[i]n virtually every state, records of court judicial proceedings are available from the court as a matter of public record." Brief for Search Group, Inc. *et al.* at 5-6 (citations omitted). The public availability of such records is so well established that, to a large extent, access to such records has been held to be a matter of right, under both the common law and the First Amendment. The courts have long recognized a common-law right "to inspect and copy public records and documents, including judicial records and documents." *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (footnotes omitted); *see, e.g., In re Sackett*, 136 F.2d 248 (1943); *Ex parte Drawbaugh*, 2 App. D.C. 404 (1894). And recognizing the strong public interest in criminal prosecutions, this Court has held that the First Amendment creates a public right of access to criminal proceedings. *See, e.g., Press-Enterprise Co.* v. *Superior Court of California*, 464 U.S. 501 (1984); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). Even when legitimate concerns of witnesses or jurors are involved, the public may be excluded from criminal proceedings only upon a specific finding of a compelling interest that cannot be adequately protected in some other way. *See Press-Enterprise Co.*, 464 U.S. at 511-12; *Globe Newspaper Co.*, 457 U.S. at 606-07. Given these protections and the long tradition of public trials, it is inconceivable that the outcome of a trial—whether a conviction or an acquittal—can be considered a private matter.

The widespread availability of criminal-record information undermines any suggestion that such information is, as a general matter, private. In this case, of course, respondents expressly limited their request to criminal-record information that is in fact a matter of public record. If there is any privacy interest at all in such information, it is certainly attenuated. As this Court explained in *Cox Broadcasting*, "official records and documents open to the public are the basic data of governmental operations," 420 U.S. at 492, and *"the interests in privacy fade when the information involved already appears on the public record,"* *id.* at 494-95 (emphasis added).

The court of appeals' holding—that there is in general no substantial privacy interest in publicly available criminal-record information—is unassailable. The court of appeals would have been justified in holding that there is no substantial privacy interest in *any* criminal-record information. The court carefully limited its holding, however, to information that is *publicly available* in the jurisdiction in which the conviction or other official act occurred. App. 41a-42a. If a jurisdiction does not make certain criminal-record information freely available to the public, a substantial interest in privacy may still exist as to that information. Moreover, the government's assertion to the contrary notwithstanding, Petition at 15, the court made it clear that the test is *not* whether particular information "happen[s] to be" publicly available:

> If a local law enforcement official provides criminal information episodically, or to only certain requesters, that, in our view, would be inade-

> quate to cause the privacy interest in those criminal records to fade significantly.

App. 20a. What is controlling is not happenstance but the "*practices*" of the jurisdiction in question. App. 42a (emphasis added). If criminal records that were publicly available are expunged, "they can no longer be regarded as public." App. 20a. Finally, the court's decision has no application at all to records relating to confidential investigations. App. 18a.[2]

The government's reliance on footnote 5 of this Court's opinion in *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595 (1982), is misplaced. Petition at 14-16. There the Court indicated that an interest in privacy is not necessarily vitiated by the fact that information "is a matter of public record somewhere in the Nation." 456 U.S. at 603 n.5. Many private matters may find their way into some record available to the public; *Washington Post Co.* merely recognizes that the appearance of information in a publicly available document does not necessarily mean that any interest in privacy is lost. The

[2] Under Department of Justice regulations, the Department currently collects criminal record information only on "serious and/or significant offenses," 28 C.F.R. § 20.32(a) (1987), and does not collect information on offenses committed by juveniles unless they were tried as adults, *id.* § 20.32(b). Although retention of information collected before the regulations became effective is permitted, *id.* § 20.32(c), these restrictions assure that information about minor crimes and crimes committed during a person's youth ordinarily will not be collected by the Department. Juvenile matters are unlikely to be affected by the court of appeals' decision in any event, because they are generally treated confidentially.

Court was careful to note, however, that "[t]he public nature of information may be a reason to conclude, under all the circumstances of a given case, that the release of such information would not constitute a 'clearly unwarranted invasion of personal privacy,' . . . ." *Ibid.* Here, the court of appeals confined its holding to information that (1) is regularly made available to the public, App. 42a, and (2) concerns official acts occurring in the course of a criminal prosecution. This conclusion in no way conflicts with *Washington Post Co.*

Indeed, the court of appeals went out of its way to indicate that the information might be exempt if a showing were made similar to the claim asserted in *Washington Post Co.*—that disclosure of the American citizenship of two "prominent figures in Iran's Revolutionary Government" would invade their privacy by subjecting them to "'a real threat of physical harm.'" 456 U.S. at 597. The court of appeals made it clear that the information sought might be exempt if there were reason to believe disclosure would cause harm:

> For instance, had it been shown to us that disclosure of Medico's "rap sheet" would cause him particular harm, even though his privacy interest is slight, we might well have reached a different conclusion.

App. 40. The court's analysis was thus fully consistent with *Washington Post Co.*

The Court can quickly dispense with the assertion, Petition at 14, that the decision below conflicts with the Second Circuit's decision in *Rose* v. *Dep't of the Air Force*, 495 F.2d 261 (2d Cir. 1974), *aff'd*, 425 U.S. 352 (1976). *Rose* did not concern either crim-

inal records or any other type of publicly available information; it involved summaries of honor and ethics hearings held at a military academy. Whereas the ruling here applies to information which is inherently of public concern and is freely accessible to the general public, the information in *Rose* related solely to possible ethical transgressions of students at the academy, was available only within the military academy, and even then was in some cases redacted to protect the identity of the student. 495 F.2d at 266.[3]

The government makes a great deal of the "widespread concern that privacy is, as a practical matter, threatened by the availability of compiled information in large, centralized government data banks." Petition at 18. But whatever concerns government data banks may raise as a general matter, the existence of such data banks cannot and does not transform the fundamentally public information at issue here —publicly available criminal-record information—

[3] These striking differences dispose of the government's charge that the court of appeals "ignor[ed] [an] important element of personal privacy"—namely, that "persons with prior access to the information may not have realized its significance or may have forgotten what they once knew." Petition at 14 (citation omitted). It is one thing to recognize that these factors help explain why there can be a legitimate expectation of privacy where, as in *Rose*, information has been disclosed only to a select group for a limited purpose. It would be quite another thing to hold that there can be a legitimate expectation of privacy as to *publicly available* information concerning criminal conduct and the administration of justice. An individual's interest in maintaining difficulty of access to publicly available documents reflecting his criminal record cannot be equated with a legitimate interest in privacy.

into private information. A public fact such as a conviction is not transformed into a private fact when it is included in a government data bank.

The proper means of addressing concerns about government data banks is executive action limiting the gathering or retention of information thought to pose a threat to privacy, or legislation limiting access to particular types of information. As the court of appeals noted, Congress has considered the possibility of limiting access to federal compilations of public criminal records, App. 23a n.15, 42a, but "has chosen not to pass a statute that would establish the federal policy that [petitioners] now urge us to announce without a legislative mandate," App. 42a. Since the government has abandoned the contention, vigorously advanced below, that 28 U.S.C. § 534 prohibits disclosure of rap sheets, it is undisputed in this Court that no federal statute prohibits disclosure of criminal records. The concept of privacy under FOIA should not be distorted so as to serve as a surrogate for separate legislation that the Department of Justice believes Congress should enact.[4]

[4] The government's claim that the court of appeals' ruling will impose enormous administrative burdens on federal agencies cannot withstand scrutiny. Petition at 19-20. First, the government has made no showing that agencies receive a substantial volume of requests for criminal-record information. Second, an agency is not obligated to determine the practices of the source jurisdiction before deciding whether to release the information. FOIA exemptions are discretionary, not mandatory. *See Chrysler Corp.* v. *Brown*, 441 U.S. 281, 293 (1979). Whether to determine the practices of the source jurisdiction, on the small chance that the jurisdiction may restrict access to the information, is for the government to decide in the exercise of its discretion. Given that criminal-record information is apparently freely accessible to the public

II. Certiorari Should Not Be Granted To Clarify the Law of the District of Columbia Circuit Concerning the "Public Interest" Side of the Balancing Test.

This Court should also reject the government's invitation, Petition at 22-29, to grant certiorari to review the court of appeals' discussion of the "public interest" side of the balancing performed under Exemptions 6 and 7(C). The court of appeals emphasized that the Medicos reportedly had had dealings with government officials, App. 38a, but declined to create a hierarchy distinguishing among different types of criminal-record information, App. 38a-40a. The court indicated that the focus should be on "the general disclosure policies of the statute," App. 39a (footnote omitted), and concluded that those policies require disclosure of publicly available criminal-record information concerning Charles Medico. App. 26a, 42a.

These statements do not warrant review by this Court. Prior to the decision below, the District of Columbia Circuit had repeatedly considered the public interest in the particular information at issue in balancing the privacy interest at stake against the public interest in disclosure under Exemptions 6 and 7(C). *See, e.g., Carter* v. *United States Dep't of Commerce*, 830 F.2d 388, 391 n.13, 394 & n.20 (D.C. Cir. 1987); *Senate of Puerto Rico* v. *United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987);

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in nearly every state, see pp. 7-8, *supra*, it would not be unreasonable for the Department of Justice to inform state law enforcement agencies supplying criminal-record information that such information will be subject to disclosure under FOIA unless the agency notifies the Department that it restricts access to the information.

Stern v. *FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984); *Fund for Constitutional Government* v. *National Archives & Records Service*, 656 F.2d 856, 866 (D.C. Cir. 1981); *Baez* v. *United States Dep't of Justice*, 647 F.2d 1328, 1338-39 (D.C. Cir. 1980); *Rural Housing Alliance* v. *United States Dep't of Agric.*, 498 F.2d 73, 77-78 (D.C. Cir. 1974); *Getman* v. *N.L.R.B.*, 450 F.2d 670, 675-77 (D.C. Cir. 1971). Although the panel below declined to distinguish among different types of criminal-record information, the panel's general statements concerning assessment of the "public interest" are unlikely to supplant this long line of decisions and preclude any inquiry into the interest in disclosure of the particular information sought.[5] Indeed, in *Washington Post Co.* v. *United States Dep't of State*, No. 84-5604 (D.C. Cir. Feb. 5, 1988), which was decided *after* the decision below and which the government itself cites, the court remanded the case for a "balancing," following discovery and an evidentiary hearing, of "the disclosure and the privacy interests staked out *in this case*." Slip op. at 21 (emphasis added). It is thus already apparent that the panel decision in this case is unlikely to have the sweeping effect ascribed to it by the government.[6]

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[5] Under settled precedent in the District of Columbia Circuit, one panel cannot overrule another; a panel decision can be overruled only by the full court sitting en banc. *See, e.g., Henderson* v. *Milobsky*, 595 F.2d 654, 657 n.14 (D.C. Cir. 1978).

[6] In an attempt to build up the importance of the court of appeals' abstract discussion of the "public interest" issue, the government asserts that the court's decision may "engender confusion." Petition at 12 n.4. The government states that in *United States Dep't of the Air Force* v. *FLRA*, No. 87-1143 (7th Cir. Jan. 27, 1988), the Seventh Circuit

It is obviously impossible to predict precisely how later panels in the District of Columbia Circuit will attempt to reconcile the statements in the opinion below with the long line of decisions in the Circuit focusing on the interest in disclosure of the specific information sought. However, we suspect that the opinion here will have little, if any, influence beyond the factual situation that the court specifically addressed: criminal-record information freely accessible to the public. As applied to those facts (the only concrete set of facts before the court), the refusal to create a hierarchy distinguishing different types of crime is entirely defensible.

The court was dealing with information which it had already recognized posed little threat to privacy, and was responding to the government's contention that the public interest in disclosure was minimal—even though Medico Industries was, according to the Pennsylvania Crime Commission, "dominated by organized crime figures," and had been awarded lucra-

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"agree[d] with the court below that courts may not inquire into the public interest favoring disclosure of particular information." Petition at 12 n.4. In fact, however, the Seventh Circuit embraced the traditional approach to balancing the public interest in disclosure against the privacy interest at stake, while clarifying that the particular purpose of the requester is not important: "The balancing . . . must be conducted at a more general level. Do the several uses to which many people would put the information justify its release?" Slip op. at 7. It is surprising that the government would cite this opinion as evidence that the court of appeals' decision will create "confusion," since the government itself states that "we agree with the court's view that the Exemption 6 or Exemption 7(C) balance does not vary from case to case depending on the identity of the requester." Petition at 21 n.14.

tive defense contracts with the help of a congressman under investigation for conflict of interest and corruption at the time of the FOIA requests. Given the minimal privacy interest at stake, the substantial federal funding, and the investigation of Congressman Flood, the court was surely correct in ruling that no special showing of importance was necessary to justify disclosure. Under the circumstances, the public interest in any information concerning Charles Medico's criminal record outweighs whatever minimal privacy interest may be at stake.

If the public interest in disclosure in this case is judged in terms of the "basic purposes" that the government ascribes to FOIA, Petition at 27, respondents' requests easily satisfy the standard for disclosure. As the court of appeals noted, "[t]he subjects of [respondents'] requests are alleged to have had dealings with government officials . . . ." App. 38a. Moreover, the dealings were significant, and the type of information sought is pertinent to the subjects' fitness to receive government contracts. Respondents' requests are thus fully compatible with the "basic purpose" of FOIA—"to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citations omitted).

In the district court, the government conceded that any interest in privacy was outweighed by the public interest in disclosure of "financial crime" information, but arbitrarily refused to disclose information about any other crimes. Given the facts of this case,

the court of appeals properly rejected the government's contention that "non-financial crime" information is exempt from disclosure. Any crime would be relevant to Charles Medico's fitness to carry out a federal contract, and many "non-financial" crimes (such as perjury or making false statements to a government agency) would be just as important as "financial" crimes.

Any tension between the opinion below and other opinions in the District of Columbia Circuit is not one that merits the attention of this Court. *See Davis* v. *United States*, 417 U.S. 333, 340 (1970); *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (*per curiam*). That tension is likely to be resolved in a satisfactory fashion without this Court's intervention; in the unlikely event it is not satisfactorily resolved, there will be time enough for the Court to become involved.

Finally, if it ever becomes necessary for this Court to resolve the "public interest" issue raised by the government, the Court should do so in a case in which it would receive an adversary presentation on the issue. Here, respondents agree with the government that the public interest in particular information may be considered, if for no other reason than to illustrate the general interests in disclosure underlying FOIA and to facilitate the required balancing of interests. The fact that the parties do not appear to disagree on how to approach the "public interest" question is an additional consideration making this case an unworthy candidate for review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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